jms

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

HUTTON CONTRACTING COMPANY, INC., **Plaintiff,**	)	
v.	)	
STANION WHOLESALE ELECTRIC COMPANY, **Defendant.**	)	
	)	**Case No. 01-4058-JAR**
STANION WHOLESALE ELECTRIC COMPANY, **Defendant/Third Party Plaintiff,**	)	
v.	)	
INTERNATIONAL UTILITY STRUCTURES, INC., **Third Party Defendant.**	)	

MEMORANDUM ORDER AND OPINION GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, MOTION TO STAY; GRANTING MOTION FOR STAY; AND GRANTING MOTION TO CONTINUE TRIAL OR FIRST SETTING

On March 30, 2004, the Court entered an Order (Doc. 121) granting third party defendant International Utility Structures, Inc.'s (IUSI) Motion to Substitute Party. This matter comes before the Court on plaintiff Hutton Contracting, Inc.'s Motion to Reconsider the Court's ruling on the motion to substitute, or in the alternative, Motion to Stay (Doc. 124). Also before the Court are plaintiff's Motion for Stay (Doc. 118), and Motion to Continue Trial or First Setting (Doc. 119). For the reasons stated below, the Motion to Reconsider, or in the alternative, Motion for Stay is granted in part and denied in part; the Motion for Stay is granted; and the Motion to

Continue Trial or First Setting is granted.

I. Background

This is an action for breach of contract and negligence arising out of a purchase agreement entered into between plaintiff and defendant Stanion Wholesale Electric Company (Stanion). Stanion subsequently brought a third-party claim for indemnity and contribution against IUSI. On November 4, 2003, plaintiff filed a Suggestion of Bankruptcy regarding an order obtained by third-party defendant IUSI from the Court of Queens, Bench of Alberta, which provided IUSI with creditor protection and prevented creditors from taking any legal actions against IUSI or its assets. On November 26, 2003, Hutton filed a Motion to Stay seeking to "prevent further prosecution of this case until the stay is lifted." The bankruptcy order stayed all actions affecting the applicant and "its business, operations, assets or undertaking or other remedies" in Canada or elsewhere.

On March 30, 2004, the Court held a telephonic conference with the parties regarding IUSI's bankruptcy. During this conference, the parties, which were all represented by counsel, agreed that the substitution of International Utility Structures (US), Inc. (IUS(US)) for IUSI as third-party defendant would be proper and that Mr. Forbes, counsel for IUSI, would file the appropriate motion. On that same day, IUSI filed a motion to substitute IUS(US) as third-party defendant and the Court granted the motion to substitute. On April 13, 2004, plaintiff, who has asserted no claims against third-party defendant IUS(US) or former third-party defendant IUSI, filed the instant motion asking the Court to reconsider its order of substitution, or in the alternative, to stay the case due to the Canadian bankruptcy.

In arguing that a stay was appropriate, even if IUS(US) was properly substituted as third

party defendant, plaintiff informed the Court that "[w]hile the original [bankruptcy] Order requires the stay to be in effect until November 14, 2003, an Order dated January 28, 2004, extended the stay until June 30, 2004." Thus, the Court entered an Order to Show Cause on August 9, 2004, why the motion for a stay in the alternative was not moot. Both IUS(US) and plaintiff have advised the Court that the stay has been extended until September 30, 2004. Although no application has been made to extend the stay beyond September 30, the Canadian court has the authority to do so should such an application be made and the court finds such an extension appropriate.

II. Discussion

A. Motion to Reconsider

A motion to reconsider filed within ten days of the entry of final judgment is treated as a motion to alter or amend pursuant to Fed. R. Civ. P. 59(e).[1] A motion to alter or amend judgment pursuant to Rule 59(e) may be granted only if the moving party can establish: (1) an intervening change in the controlling law; (2) the availability of new evidence that could not have been obtained previously through the exercise of due diligence; or (3) the need to correct clear error or prevent manifest injustice.[2] A losing party should not use a motion for reconsideration as a vehicle to rehash arguments previously considered and rejected.[3] Nor does a party's failure to present its strongest case in the first instance entitle it to a second chance in the form of a

---

[1] *See Van Skiver v. United States,* 952 F.2d 1241 (10th Cir. 1991), *cert. denied,* 506 U.S. 828 (1992).

[2] *Brown v. Presbyterian Healthcare Servs.,* 101 F.3d 1324, 1332 (10th Cir. 1996), *cert. denied* 520 U.S. 1181 (1997)

[3] *Voelkel v. Gen. Motors Corp.*, 846 F. Supp. 1482, 1483 (D. Kan. 1994).

motion for reconsideration.[4] The party seeking reconsideration bears the burden to demonstrate a change in the law, the availability of new evidence, or that reconsideration is necessary to prevent manifest injustice.[5] The decision to grant or deny a motion for reconsideration is committed to a court's discretion.[6]

1. Timeliness of the Motion

Stanion argues that plaintiff's motion should be denied as untimely. D. Kan. Rule 7.3 provides that "motions seeking reconsideration of non-dispositive orders shall be filed within ten days after the filing of the order unless the time is extended by the court."[7] The Court's order was entered on March 30, 2004, and plaintiff's motion for reconsideration was filed on April 13, 2004. Excluding intermediate Saturdays and Sundays as required by Rule 6(a) of the Federal Rules of Civil Procedure,[8] plaintiff's motion was filed ten days after the filing of the Court's order. Thus, plaintiff's motion is timely.

2. Standing

Both Stanion and IUS(US) contend that plaintiff lacks standing to challenge the substitution because IUS(US) is merely a third party defendant and plaintiff does not have a claim against either IUS(US) or IUSI. Therefore, Stanion and IUS(US) argue, that plaintiff has suffered no injury in fact from the substitution. The Court agrees. It is axiomatic that to have

---

[4] *Sac & Fox Nation of Missouri v. LaFaver*, 993 F. Supp. 1374, 1375-76 (D. Kan. 1998).

[5] *Id.* at 1376.

[6] *Hancock v. City of Oklahoma*, 857 F.2d 1394, 1395 (10th Cir. 1988).

[7] D. Kan. Rule 7.3(b).

[8] Fed. R. Civ. P. 6(a) ("When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.").

standing, a plaintiff must actually assert a claim against a defendant.[9] Standing requires that a plaintiff suffer an injury in fact, which is traceable to the challenged action, and which will likely be redressed by the relief sought.[10] Here, plaintiff has not asserted a claim against third party defendant, IUS(US), which would redress an alleged injury in fact. Nor has plaintiff identified any harm traceable to IUS(US)'s substitution. Thus, plaintiff lacks standing to challenge the substitution.

Plaintiff also argues that IUSI did not assert the defense that it was not the proper party against whom the third-party claims could be brought and therefore has waived the defense. Just as it lacks standing to challenge the substitution, plaintiff, as a nonparty to the third-party complaint, lacks standing to challenge IUSI's assertion of this defense. Moreover, the Court notes that a motion to substitute pursuant to Rule 17 provides that after a real party in interest objection, a party shall have "a reasonable time" to substitute the proper party.[11] Here, the parties informed the Court on March 30, 2004, that IUS(US) was the actual seller of poles and the Court substituted the proper party on the same day. Thus, the motion to substitute was filed the same day IUSI and Stanion objected to IUSI's continuing as third-party plaintiff, or within a reasonable time.

3. Prejudice

Even if plaintiff could challenge the Court's decision, it has not shown that prejudice

---

[9]*See* U.S. CONST. art. III § 2 (standing for the proposition that federal courts only have power to adjudicate actual cases and controversies). *See also Powell v. McCormack*, 395 U.S. 486, 512-13 (1969) (noting that a federal district court lacks jurisdiction over the subject matter "if it is not a 'case or controversy'" within the meaning of Article III of the Constitution) (citations omitted) .

[10]*Tandy v. City of Wichita*, __ F.3d__, 2004 WL 1895215 at *4 (10th Cir. August 25, 2004).

[11]Fed. R. Civ. P. 17(a).

resulted from the Court's order. Plaintiff alleges that the Court's substitution was in error, and the real party in interest is not IUS(US), but IUSI. Stanion, IUS(US) and IUSI, however, agree that IUS(US) was the seller of the poles at issue, and is the proper defendant. Both parties have provided the Court with documents supporting their respective views. IUSI attached to its motion to substitute an invoice regarding the poles in question. Invoice number 6341 describes sixty one steel poles, which were sold to Stanion Wholesale Electric from IUS(US) for $73,709.60. The invoice directs Stanion to remit payment to Dallas, Texas. In contrast, plaintiff has attached several IUSI fax cover sheets, with an attached quote, purchase order confirmation, and an update on the status of the poles. The fax cover sheets bear an Alberta, Canada address. The Court concludes that by proffering the invoice regarding the poles in question Stanion has shown some evidence that IUS(US) was the seller of poles. Moreover, the Court notes that Stanion, as third party plaintiff, has the right to a third party defendant of its choosing and stands to lose the most if its claim for indemnity or contribution is denied because it has sued the wrong party.

In addition, as plaintiff has no claim against IUS(US), the Court fails to see how plaintiff would be prejudiced even assuming, *arguendo*, the wrong party was substituted. Plaintiff argues that "any judgment [it] may obtain against Stanion depends on the enforceability of Stanion's third-party claims." Plaintiff's claim, however, does not depend on whether Stanion is ultimately successful in its third-party claim. The third-party complaint merely affects the method Stanion may utilize to satisfy plaintiff's possible claim against it. Even if Stanion is unsuccessful in its third party claim, plaintiff may still obtain a judgment against Stanion which Stanion will be obligated to satisfy. Plaintiff has not even hinted that Stanion would be unable to

satisfy such a judgment if its third-party complaint fails.

Finally, plaintiff alleges that the substitution will delay the proceedings. In the Court's view, the substitution can only expedite the proceedings as the original third party defendant was subject to an automatic Canadian bankruptcy stay. Indeed, the substitution of IUS(US) was driven by the bankruptcy stay. Plaintiff has shown no basis for the Court to revisit its order substituting IUS(US) for IUSI; thus, plaintiff's motion to reconsider must be denied.

B. Motion to Stay

Plaintiff urges that even if IUS(US) was properly substituted as third party defendant, the Canadian bankruptcy stay is applicable to any matters involving IUS(US), and therefore, the Court should stay this case. An organization chart shows that IUSI is the ultimate parent company of International Utility Structures (Luxembourg) S.A.R.L., (IUSL), which has as one of its subsidiaries, IUS Holdings, Inc. In turn, IUS (US) is a subsidiary of IUS Holdings. Thus, IUS(US) is clearly an indirect subsidiary of IUSI. The Court must therefore determine whether the stay applicable to IUSI also stays matters related to IUS(US).

On October 17, 2003, The Canadian court entered an Order pursuant to the Companies' Creditors Arrangement Act[12] providing for the restructuring of IUSI. As part of that Order, the court stayed, *inter alia*:

> any and all proceedings, including, without limitation, suits . . . affecting the Applicant, its business, operations, assets or undertaking, or other remedies (collectively, "Proceedings"), commenced . . . in Canada or elsewhere . . . against or in respect of the Applicant or any person who is from and after the date of this

[12]"The CCAA [Companies' Creditors Arrangement Act] is a Canadian federal statute which provides a statutory system, roughly equivalent to the Chapter 11 process in the United States, whereby corporations which are insolvent may seek court protection from creditor actions as they attempt to restructure their financial affairs, usually by way of a plan of arrangement or compromise with creditors." *In re Fracmaster, Ltd.*, 237 B.R. 627 630 n.3 (Bkrtcy. E.D. Tex. 1999).

> Order a director, officer, or employee of the Applicant, or in respect to any present or future property of the Applicant, whether real or personal and wherever located "the Property") . . . .

The Order defines the Applicant as IUSI. The Canadian court also specifically requests the aid of courts in the United States, France, and Luxembourg, the location of IUSI's subsidiaries, to aid in the enforcement of its Order.

Although the Canadian Order, on its face, applies only to the Applicant, or IUSI, it also applies to any lawsuit affecting IUSI's business, operations, assets, or undertaking. The Court concludes that this broad language includes IUSI's indirect subsidiary IUS(US). The restructuring of IUSI clearly affects not only IUSI, but also its subsidiaries as the Order discusses IUSI's affiliates and subsidiaries. For instance, the Order provides that IUSI may pay all expenses incurred in carrying on its business including, "all payments . . . reasonably necessary for the preservation of the Property and ongoing business of IUSI Canada and its affiliates," and for the appointment of a Monitor to oversee "the Applicant's and its direct and indirect subsidiaries' receipts and disbursements." It is also apparent, as evidenced by documentation from both IUSI and IUS(US) regarding the sale of poles at issue in this case, that IUSI and IUS(US)'s business dealings are intertwined. Indeed, the Canadian Order authorizes IUSI to continue its "customary intercompany accounting and cash management procedures in the ordinary course." Because a lawsuit against IUS(US) will affect "the Applicant, its business, operations, assets or undertaking," the stay applicable to IUSI pursuant to the Canadian restructuring also stays the current action.[13]

---

[13]Plaintiff also argues that an identity of interest exists between IUSI and IUS(US) such that a judgment against IUS(US) would essentially be a judgment against IUSI, and that such an identity provides another basis for a stay. In light of the Court's determination that IUS(US) is subject to the automatic Canadian bankruptcy stay, the

The Court observes that the parties are not completely foreclosed from moving forward. The Canadian Order provides that "any interested person may apply to [the Court] to vary or rescind this Order or seek other relief on 4 clear days notice. . . ." If the parties wish the lawsuit to proceed before the stay is lifted, they may apply to the Canadian Court for relief from the stay.

C. Motion to Continue Trial

Also under advisement is plaintiff's motion to continue the trial. Because the case is stayed indefinitely pending resolution of the Canadian bankruptcy, plaintiff's motion to continue the trial shall be granted.

IT IS THEREFORE ORDERED BY THE COURT that plaintiff's Motion for Reconsideration, and in the alternative, Motion to Stay is GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED BY THE COURT that plaintiff's Motion for Stay (Doc. 118) is GRANTED and the proceedings in this Court are STAYED until further order of the Court. The parties shall notify the Court when the automatic stay imposed by the Canadian bankruptcy court is lifted.

IT IS FURTHER ORDERED BY THE COURT that plaintiff's Motion to Continue Trial or First Setting (Doc. 119) is GRANTED.

IT IS SO ORDERED.

Dated this 9th day of September 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

Court need not reach this issue.